

1 SENATE BILL NO. 412

2 INTRODUCED BY K. TOOLE

3
4 A BILL FOR AN ACT ENTITLED: "AN ACT GENERALLY REVISING LAWS TO PROVIDE FOR THE PROTECTION
5 OF FISH AND FISH HABITAT; REQUIRING THE FISH, WILDLIFE, AND PARKS COMMISSION TO ADOPT RULES
6 GOVERNING RECREATIONAL USE OF CERTAIN WATERS IN THE INTEREST OF PROTECTION OF FISH AND
7 FISH HABITAT; REQUIRING THE SUPERVISORS TO MODIFY A PROJECT UNDER THE NATURAL STREAMBED
8 AND LAND PRESERVATION ACT OF 1975 TO MITIGATE ADVERSE EFFECTS TO FISH AND AQUATIC
9 HABITAT; REQUIRING LOCAL GOVERNING BODIES TO REVIEW SUBDIVISION PROPOSALS FOR THE
10 EFFECT ON FISH AND FISH HABITAT; REVISING THE STREAMSIDE MANAGEMENT ZONE LAWS TO
11 PROVIDE FOR PROTECTION OF FISH AND FISH HABITAT; REQUIRING THAT METAL MINE RECLAMATION
12 PLANS IDENTIFY METHODS TO BE USED TO MITIGATE OR ELIMINATE ADVERSE IMPACTS ON FISH AND
13 FISH HABITAT; REVISING THE CRITERIA FOR APPROVAL OF WATER USE PERMITS AND CHANGES IN
14 APPROPRIATION RIGHTS TO INCLUDE ADVERSE EFFECTS ON FISH AND FISH HABITAT; REVISING THE
15 CRITERIA REQUIRING RETURN OF SURPLUS WATER TO THE STREAM TO INCLUDE PROTECTION OF FISH
16 AND FISH HABITAT; DEFINING "FISH HABITAT"; ADDING FISH HABITAT TO THE STATE POLICY REGARDING
17 PROTECTION OF FISH AND WILDLIFE RESOURCES; REQUIRING THE DEPARTMENT OF FISH, WILDLIFE,
18 AND PARKS TO CONSIDER FISH HABITAT IN ITS REVIEW OF GOVERNMENT CONSTRUCTION AND
19 HYDRAULIC PROJECTS AND IN ITS OBJECTIONS TO FEDERAL ACTIONS; AND AMENDING SECTIONS
20 23-2-302, 75-7-112, 75-7-113, 76-3-608, 77-5-301, 77-5-303, 82-4-335, 85-2-311, 85-2-402, 85-2-407, 85-2-412,
21 87-5-501, 87-5-504, 87-5-505, AND 87-5-508, MCA."

22
23 WHEREAS, Montana's fish resources are important to the state's economic future; and
24 WHEREAS, the amount of \$422 million was spent on fishing in Montana in 2001; and
25 WHEREAS, expenditures related to fish and wildlife increased by 50% between 1996 and 2001; and
26 WHEREAS, spending on fishing, hunting, and wildlife watching supports the equivalent of 8,100 full-time
27 jobs in Montana;
28 WHEREAS, the economic vitality of the fishing industry in Montana is dependent on healthy fish
29 populations; and
30 WHEREAS, healthy fish populations are dependent on clean and abundant water and sustainable fish

1 habitat;

2 WHEREAS, loss or impairment of fish habitat presents a significant threat to fish populations; and

3 WHEREAS, pursuant to section 87-5-501, MCA, it is the policy of the State of Montana that its fish
4 resources and fishing waters be protected and preserved so that they will be available for all time, without change,
5 in their natural existing state, except as may be necessary and appropriate after due consideration of all factors
6 involved; and

7 WHEREAS, pursuant to section 90-1-112, MCA, it is the policy of the State of Montana to take a proactive
8 role to ensure that Montana has the flexibility and resources to be an effective competitor in the global marketplace;
9 and

10 WHEREAS, elimination and mitigation of adverse impacts on Montana's fish and fish habitat is essential
11 to sustaining Montana's fish resources as well as to maintaining and enhancing Montana's economy.

12

13 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

14

15 **Section 1.** Section 23-2-302, MCA, is amended to read:

16 **"23-2-302. Recreational use permitted -- limitations -- exceptions.** (1) Except as provided in
17 subsections (2) through (5), all surface waters that are capable of recreational use may be so used by the public
18 without regard to the ownership of the land underlying the waters.

19 (2) The right of the public to make recreational use of surface waters does not include, without permission
20 or contractual arrangement with the landowner:

21 (a) the operation of all-terrain vehicles or other motorized vehicles not primarily designed for operation upon
22 the water;

23 (b) the recreational use of surface waters in a stock pond or other private impoundment fed by an
24 intermittently flowing natural watercourse;

25 (c) the recreational use of waters while diverted away from a natural water body for beneficial use pursuant
26 to Title 85, chapter 2, part 2 or 3, except for impoundments or diverted waters to which the owner has provided
27 public access;

28 (d) big game hunting except by long bow or shotgun when specifically authorized by the commission;

29 (e) overnight camping within sight of any occupied dwelling or within 500 yards of any occupied dwelling,
30 whichever is less;

1 (f) the placement or creation of any permanent duck blind, boat moorage, or any seasonal or other objects
2 within sight of or within 500 yards of an occupied dwelling, whichever is less; or

3 (g) use of a streambed as a right-of-way for any purpose when water is not flowing ~~therein~~ in the streambed.

4 (3) The right of the public to make recreational use of class II waters does not include, without permission
5 of the landowner:

6 (a) big game hunting;

7 (b) overnight camping;

8 (c) the placement or creation of any seasonal object; or

9 (d) other activities ~~which that~~ are not primarily water-related ~~pleasure activities~~ recreational use as defined
10 in 23-2-301(4).

11 (4) The right of the public to make recreational use of surface waters does not grant any easement or right
12 to the public to enter onto or cross private property in order to use ~~such the~~ waters for recreational purposes.

13 (5) The commission shall adopt rules pursuant to 87-1-303, in the interest of public health, public safety,
14 the protection of fish and fish habitat, as defined in 87-5-501, or the protection of public and private property,
15 governing recreational use of class I and class II waters. These rules must include the following:

16 (a) the establishment of procedures by which any person may request an order from the commission:

17 (i) limiting, restricting, or prohibiting the type, incidence, or extent of recreational use of a surface water;

18 or

19 (ii) altering limitations, restrictions, or prohibitions on recreational use of a surface water imposed by the
20 commission;

21 (b) provisions requiring the issuance of written findings and a decision whenever a request is made pursuant
22 to the rules adopted under subsection (5)(a); and

23 (c) a procedure for the identification of streams within class II waters ~~which that~~ are not capable of
24 recreational use or are capable of limited recreational use; and a procedure to restrict the recreational use to the
25 actual capacity of the water.

26 (6) The provisions of this section do not affect any rights of the public with respect to state-owned lands
27 that are school trust lands or any rights of lessees of ~~such those~~ lands."

28

29 **Section 2.** Section 75-7-112, MCA, is amended to read:

30 **"75-7-112. Procedure for considering projects -- team.** (1) Upon acceptance of a notice of a proposed

1 project, the district or the district's authorized representative shall, within 10 working days, notify the department
2 of the project. If at any time during the review process the supervisors determine that provisions of this part do not
3 apply to a notice of the proposed project, the applicant may proceed upon written notice of the supervisors. The
4 department shall, within 5 working days of receipt of the notification, inform the supervisors whether the department
5 requests an onsite inspection by a team.

6 (2) The supervisors shall call a team together within 20 days of receipt of the request of the department
7 for an onsite inspection. A member of the team shall notify the supervisors in writing, within 5 working days after
8 notice of the call for an inspection, of the team member's waiver of participation in the inspection. If the department
9 does not request an onsite inspection within the time specified in this subsection, the supervisors may deny,
10 approve, or modify the project.

11 (3) Each member of the team shall recommend in writing, within 30 days of the date of inspection, denial,
12 approval, or modification of the project to the supervisors. The applicant may waive participation in this
13 recommendation.

14 (4) The supervisors shall review the proposed project and affirm, overrule, or modify the individual team
15 recommendations and notify the applicant and team members, within 60 days of the date of application, of their
16 decision.

17 (5) When a member of the team disagrees with the supervisors' decision, the team member shall request,
18 within 5 working days of receipt of the supervisors' decision, that an arbitration panel as provided in 75-7-114 be
19 appointed to hear the dispute and make a final written decision regarding the dispute.

20 (6) Upon written consent of the supervisors, the applicant shall notify the supervisors in writing within 15
21 days if the applicant wishes to proceed with the project in accordance with the supervisors' decision. Work may
22 not be commenced on a project before the end of the 15-day waiting period unless written permission is given by
23 all team members and the district.

24 (7) The supervisors may extend, upon the request of a team member, the time limits provided in
25 subsections (3) and (4) when, in their determination, the time provided is not sufficient to carry out the purposes
26 of this part. The time extension may not, in total, exceed 1 year from the date of application. The applicant must
27 be notified, within 60 days of the date of application, of the initial time extension and must be notified immediately
28 of any subsequent time extensions.

29 (8) Work on a project under this part may not take place without the written consent of the supervisors.

30 (9) The team, in making its recommendation, and the supervisors, in denying, approving, or modifying a

1 project, shall determine:

2 (a) the purpose of the project; and

3 (b) whether the proposed project is a reasonable means of accomplishing the purpose of the proposed
4 project. To determine if the project is reasonable, the following must be considered:

5 (i) the effects on soil erosion and sedimentation, considering the methods available to complete the project
6 and the nature and economics of the various alternatives;

7 (ii) whether there are modifications or alternative solutions that are reasonably practical that would reduce
8 the disturbance to the stream and its environment and better accomplish the purpose of the proposed project;

9 (iii) whether the proposed project will create harmful flooding or erosion problems upstream or downstream;

10 (iv) the effects on stream channel alteration;

11 (v) the effects on streamflow, turbidity, and water quality caused by materials used or by removal of ground
12 cover; and

13 (vi) the effect on fish and aquatic habitat. If the team determines that the proposed project will result in
14 adverse effects on fish or aquatic habitat, the supervisors shall modify the project to mitigate or eliminate the
15 adverse effects.

16 (10) If the supervisors determine that a proposed project or part of a proposed project should be modified,
17 they may condition their approval upon the modification.

18 (11) The supervisors may not approve or modify a proposed project unless the supervisors determine that
19 the purpose of the proposed project will be accomplished by reasonable means."
20

21 **Section 3.** Section 75-7-113, MCA, is amended to read:

22 **"75-7-113. Emergencies -- procedure.** (1) The provisions of this part do not apply to those actions that
23 are necessary to safeguard life or property, including growing crops, during periods of emergency. The person
24 responsible for a taking action under this section shall notify the supervisors in writing within 15 days of the action
25 taken as a result of an emergency.

26 (2) The emergency notice given under subsection (1) must contain the following information:

27 (a) the location of the action taken;

28 (b) a general description of the action taken;

29 (c) the date on which the action was taken; and

30 (d) an explanation of the emergency causing the need for the action taken.

1 (3) If the supervisors determine that the action taken meets the definition of a project, the supervisors shall
2 send one copy of the notice, within 5 working days of its receipt, to the department.

3 (4) A team, called together as described in 75-7-112(2), shall make an onsite inspection within 20 days
4 of receipt of the emergency notice.

5 (5) Each member of the team shall recommend in writing, within 30 days of the date of the emergency
6 notice, denial, approval, or modification of the project.

7 (6) The supervisors shall review the emergency project and affirm, overrule, or modify the individual team
8 recommendations and notify the applicant and team members of their decision within 60 days of receipt of the
9 emergency notice.

10 (7) A person who has undertaken an emergency action that is denied or modified shall submit written
11 notice, as provided in 75-7-111, to obtain approval pursuant to 75-7-112 to mitigate the damages to the stream, fish,
12 or aquatic habitat caused by the emergency action and to achieve a long-term solution, if feasible, to the emergency
13 situation. Notice under this subsection must be filed within 90 days after the supervisors' decision.

14 (8) When a member of the team disagrees with the supervisors' decision of an emergency action, the team
15 member shall request that an arbitration panel, as provided for in 75-7-114, be appointed to hear the dispute and
16 to make a final written decision on the dispute.

17 (9) The failure of a person to perform the following subjects the person to civil and criminal penalties under
18 75-7-123:

19 (a) failure to provide emergency notice under subsection (1);

20 (b) failure to submit a notice of the project under subsection (7); or

21 (c) failure to implement the terms of a supervisors' decision for the purpose of mitigating the damage to
22 the stream, fish, or aquatic habitat caused by the emergency action and of achieving a permanent solution, if
23 feasible, to the emergency situation."

24

25 **Section 4.** Section 76-3-608, MCA, is amended to read:

26 **"76-3-608. Criteria for local government review.** (1) The basis for the governing body's decision to
27 approve, conditionally approve, or disapprove a subdivision is whether the preliminary plat, applicable environmental
28 assessment, public hearing, planning board recommendations, or additional information demonstrates that
29 development of the subdivision meets the requirements of this chapter. A governing body may not deny approval
30 of a subdivision based solely on the subdivision's impacts on educational services.

1 (2) The governing body shall issue written findings of fact that weigh the criteria in subsection (3), as
2 applicable.

3 (3) A subdivision proposal must undergo review for the following primary criteria:

4 (a) except when the governing body has established an exemption pursuant to subsection (7) of this
5 section or except as provided in 76-3-505 and 76-3-509, the effect on agriculture, agricultural water user facilities,
6 local services, the natural environment, wildlife, ~~and~~ wildlife habitat, ~~and~~ fish, fish habitat, as defined in 87-5-501,
7 public health, and public safety;

8 (b) compliance with:

9 (i) the survey requirements provided for in part 4 of this chapter;

10 (ii) the local subdivision regulations provided for in part 5 of this chapter; and

11 (iii) the local subdivision review procedure provided for in this part;

12 (c) the provision of easements for the location and installation of any planned utilities; and

13 (d) the provision of legal and physical access to each parcel within the subdivision and the required notation
14 of that access on the applicable plat and any instrument of transfer concerning the parcel.

15 (4) The governing body may require the subdivider to design the subdivision to reasonably minimize
16 potentially significant adverse impacts identified through the review required under subsection (3). The governing
17 body shall issue written findings to justify the reasonable mitigation required under this subsection ~~(4)~~.

18 (5) (a) In reviewing a subdivision under subsection (3) and when requiring mitigation under subsection (4),
19 a governing body may not unreasonably restrict a landowner's ability to develop land, but it is recognized that in
20 some instances the unmitigated impacts of a proposed development may be unacceptable and will preclude
21 approval of the plat.

22 (b) When requiring mitigation under subsection (4), a governing body shall consult with the subdivider and
23 shall give due weight and consideration to the expressed preference of the subdivider.

24 (6) (a) When a minor subdivision is proposed in an area where a growth policy has been adopted pursuant
25 to chapter 1 and the proposed subdivision will comply with the growth policy, the subdivision is exempt from the
26 review criteria contained in subsection (3)(a) but is subject to applicable zoning regulations.

27 (b) In order for a growth policy to serve as the basis for the exemption provided by this subsection (6), the
28 growth policy must meet the requirements of 76-1-601.

29 (7) The governing body may exempt subdivisions that are entirely within the boundaries of designated
30 geographic areas from the review criteria in subsection (3)(a) if all of the following requirements have been met:

- 1 (a) the governing body has adopted a growth policy pursuant to chapter 1 that:
- 2 (i) addresses the criteria in subsection (3)(a);
- 3 (ii) evaluates the effect of subdivision on the criteria in subsection (3)(a);
- 4 (iii) describes zoning regulations that will be implemented to address the criteria in subsection (3)(a); and
- 5 (iv) identifies one or more geographic areas where the governing body intends to authorize an exemption
- 6 from review of the criteria in subsection (3)(a); and
- 7 (b) the governing body has adopted zoning regulations pursuant to chapter 2, part 2 or 3, that:
- 8 (i) apply to the entire area subject to the exemption; and
- 9 (ii) address the criteria in subsection (3)(a), as described in the growth policy."

10

11 **Section 5.** Section 77-5-301, MCA, is amended to read:

12 **"77-5-301. Findings and purpose.** (1) The legislature finds that the streamside management zone:

- 13 (a) acts as an effective sediment filter to maintain water quality;
- 14 (b) provides shade to regulate stream temperature;
- 15 (c) supports diverse and productive aquatic and terrestrial riparian habitats;
- 16 (d) protects the stream channel and banks;
- 17 (e) provides large, woody debris that is eventually recruited into a stream to maintain riffles, pools, and
- 18 other elements of channel structure; and
- 19 (f) promotes flood plain stability.

20 (2) The legislature further finds that maintaining the integrity of forest streams is crucial to the quality and

21 quantity of water available to Montanans for domestic, agricultural, industrial, and recreational use.

22 (3) The legislature further finds that forest streams are highly susceptible to impacts from land development

23 and that in many cases forest practices in streamside zones in Montana are causing excessive and unnecessary

24 damage to the banks, beds, and protective vegetation of forest streams.

25 (4) The legislature further finds that, through careful management in the streamside zone, owners and

26 operators can achieve timber harvest goals without sacrificing water quality or impairing the beneficial uses of the

27 water.

28 (5) The purposes of this part are:

- 29 (a) to protect the legitimate public interest in the quality and quantity of forest waters;
- 30 (b) to provide for standards, oversight, rehabilitation, and penalties to ensure that forest practices are

1 conducted in a manner that conserves the integrity of Montana's streamside zones;

2 (c) to provide guidelines for the management of wildlife habitat and protection of fish and fish habitat, as
3 defined in 87-5-501, in streamside zones; and

4 (d) to allow operators necessary flexibility to use practices appropriate to site-specific conditions in the
5 streamside management zone."

6

7 **Section 6.** Section 77-5-303, MCA, is amended to read:

8 **"77-5-303. Standards for forest practices in streamside management zones.** (1) The following
9 practices are prohibited in a streamside management zone:

10 (a) broadcast burning;

11 (b) the operation of wheeled or tracked vehicles except on established roads;

12 (c) the forest practice of clearcutting;

13 (d) the construction of roads except when necessary to cross a stream or wetland provided that adverse
14 effects to fish and fish habitat, as defined in 87-5-501, are mitigated;

15 (e) the handling, storage, application, or disposal of hazardous or toxic materials in a manner that pollutes
16 streams, lakes, or wetlands or that may cause damage or injury to humans, land, animals, or plants;

17 (f) the side-casting of road material into a stream, wetland, or watercourse; and

18 (g) the deposit of slash in streams or other water bodies.

19 (2) The department shall publish and distribute the rules implementing the streamside management
20 standards."

21

22 **Section 7.** Section 82-4-335, MCA, is amended to read:

23 **"82-4-335. Operating permit -- limitation -- fees.** (1) A person may not engage in mining, ore processing,
24 or reprocessing of tailings or waste material, construct or operate a hard-rock mill, use cyanide ore-processing
25 reagents or other metal leaching solvents or reagents, or disturb land in anticipation of those activities in the state
26 without first obtaining an operating permit from the department. A separate operating permit is required for each
27 complex.

28 (2) A small miner who intends to use a cyanide ore-processing reagent or other metal leaching solvents
29 or reagents shall obtain an operating permit for that part of the small miner's operation where the cyanide
30 ore-processing reagent or other metal leaching solvents or reagents will be used or disposed of.

1 (3) Prior to receiving an operating permit from the department, a person shall pay the basic permit fee of
2 \$500. The department may require a person who is applying for a permit pursuant to subsection (1) to pay an
3 additional fee not to exceed the actual amount of contractor and employee expenses beyond the normal operating
4 expenses of the department whenever those expenses are reasonably necessary to provide for timely and adequate
5 review of the application, including any environmental review conducted under Title 75, chapter 1, parts 1 and 2. The
6 board may further define these expenses by rule. Whenever the department determines that an additional fee is
7 necessary and the additional fee will exceed \$5,000, the department shall notify the applicant that a fee must be
8 paid and submit to the applicant an itemized estimate of the proposed expenses. The department shall provide the
9 applicant an opportunity to review the department's estimated expenses. The applicant may indicate which proposed
10 expenses the applicant considers duplicative or excessive, if any.

11 (4) The person shall submit an application on a form provided by the department, which must contain the
12 following information and any other pertinent data required by rule:

13 (a) the name and address of the operator and, if a corporation or other business entity, the name and
14 address of its officers, directors, owners of 10% or more of any class of voting stock, partners, and the like and its
15 resident agent for service of process, if required by law;

16 (b) the minerals expected to be mined;

17 (c) a proposed reclamation plan;

18 (d) the expected starting date of operations;

19 (e) a map showing the specific area to be mined and the boundaries of the land that will be disturbed, the
20 topographic detail, the location and names of all streams, roads, railroads, and utility lines on or immediately
21 adjacent to the area, and the location of proposed access roads to be built;

22 (f) the names and addresses of the owners of record and any purchasers under contracts for deed of the
23 surface of the land within the permit area and the owners of record and any purchasers under contracts for deed
24 of all surface area within one-half mile of any part of the permit area, provided that the department is not required
25 to verify this information;

26 (g) the names and addresses of the present owners of record and any purchasers under contracts for deed
27 of all minerals in the land within the permit area, provided that the department is not required to verify this
28 information;

29 (h) the source of the applicant's legal right to mine the mineral on the land affected by the permit, provided
30 that the department is not required to verify this information;

- 1 (i) the types of access roads to be built and manner of reclamation of road sites on abandonment;
- 2 (j) a plan that will provide, within limits of normal operating procedures of the industry, for completion of the
3 operation;
- 4 (k) ground water and surface water hydrologic data gathered from a sufficient number of sources and length
5 of time to characterize the hydrologic regime;
- 6 (l) a plan detailing the design, operation, and monitoring of impounding structures, including but not limited
7 to tailings impoundments and water reservoirs, sufficient to ensure that the structures are safe and stable;
- 8 (m) a plan identifying methods to be used to monitor for the accidental discharge of objectionable materials
9 and remedial action plans to be used to control and mitigate discharges to surface or ground water; ~~and~~
- 10 (n) an evaluation of the expected life of any tailings impoundment or waste area and the potential for
11 expansion of the tailings impoundment or waste site; and
- 12 (o) a plan identifying methods to be used to mitigate or eliminate any adverse impacts on fish or fish
13 habitat, as defined in 87-5-501.
- 14 (5) Except as provided in subsection (7), the permit provided for in subsection (1) for a large-scale mineral
15 development as defined in 90-6-302 must be conditioned to provide that activities under the permit may not
16 commence until the impact plan is approved under 90-6-307 and until the permittee has provided a written guarantee
17 to the department and to the hard-rock mining impact board of compliance within the time schedule with the
18 commitment made in the approved impact plan, as provided in 90-6-307. If the permittee does not comply with that
19 commitment within the time scheduled, the department, upon receipt of written notice from the hard-rock mining
20 impact board, shall suspend the permit until it receives written notice from the hard-rock mining impact board that
21 the permittee is in compliance.
- 22 (6) When the department determines that a permittee has become or will become a large-scale mineral
23 developer pursuant to 82-4-339 and 90-6-302 and provides notice as required under 82-4-339, within 6 months of
24 receiving the notice, the permittee shall provide the department with proof that the permittee has obtained a waiver
25 of the impact plan requirement from the hard-rock mining impact board or that the permittee has filed an impact plan
26 with the hard-rock mining impact board and the appropriate county or counties. If the permittee does not file the
27 required proof or if the hard-rock mining impact board certifies to the department that the permittee has failed to
28 comply with the hard-rock mining impact review and implementation requirements in Title 90, chapter 6, parts 3 and
29 4, the department shall suspend the permit until the permittee files the required proof or until the hard-rock mining
30 impact board certifies that the permittee has complied with the hard-rock mining impact review and implementation

1 requirements.

2 (7) Compliance with 90-6-307 is not required for exploration and bulk sampling for metallurgical testing
3 when the aggregate samples are less than 10,000 tons.

4 (8) A person may not be issued an operating permit if:

5 (a) that person's failure, or the failure of any firm or business association of which that person was a
6 principal or controlling member, to comply with the provisions of this part, the rules adopted under this part, or a
7 permit or license issued under this part has resulted in either the receipt of bond proceeds by the department or
8 the completion of reclamation by the person's surety or by the department, unless that person meets the conditions
9 described in 82-4-360;

10 (b) that person has not paid a penalty for which the department has obtained a judgment pursuant to
11 82-4-361;

12 (c) that person has failed to post a reclamation bond required by 82-4-305; or

13 (d) that person has failed to comply with an abatement order issued pursuant to 82-4-362, unless the
14 department has completed the abatement and the person has reimbursed the department for the cost of abatement.

15 (9) A person may not be issued a permit under this part unless, at the time of submission of a bond, the
16 person provides the current information required in subsection (4)(a) and:

17 (a) (i) certifies that the person is not currently in violation in this state of any law, rule, or regulation of this
18 state or of the United States pertaining to air quality, water quality, or mined land reclamation; or

19 (ii) presents a certification by the administering agency that the violation is in the process of being corrected
20 to the agency's satisfaction or is the subject of a bona fide administrative or judicial appeal; and

21 (b) if the person is a partnership, corporation, or other business association, provides the certification
22 required by subsection (9)(a)(i) or (9)(a)(ii), as applicable, for any partners, officers, directors, owners of 10% or more
23 of any class of voting stock, and business association members."
24

25 **Section 8.** Section 85-2-311, MCA, is amended to read:

26 **"85-2-311. Criteria for issuance of permit.** (1) A permit may be issued under this part prior to the
27 adjudication of existing water rights in a source of supply. In a permit proceeding under this part, there is no
28 presumption that an applicant for a permit cannot meet the statutory criteria of this section prior to the adjudication
29 of existing water rights pursuant to this chapter. In making a determination under this section, the department may
30 not alter the terms and conditions of an existing water right or an issued certificate, permit, or state water

1 reservation. Except as provided in subsections (3) and (4), the department shall issue a permit if the applicant
2 proves by a preponderance of evidence that the following criteria are met:

3 (a) (i) there is water physically available at the proposed point of diversion in the amount that the applicant
4 seeks to appropriate; and

5 (ii) water can reasonably be considered legally available during the period in which the applicant seeks to
6 appropriate, in the amount requested, based on the records of the department and other evidence provided to the
7 department. Legal availability is determined using an analysis involving the following factors:

8 (A) identification of physical water availability;

9 (B) identification of existing legal demands on the source of supply throughout the area of potential impact
10 by the proposed use; and

11 (C) analysis of the evidence on physical water availability and the existing legal demands, including but
12 not limited to a comparison of the physical water supply at the proposed point of diversion with the existing legal
13 demands on the supply of water.

14 (b) the water rights of a prior appropriator under an existing water right, a certificate, a permit, or a state
15 water reservation will not be adversely affected. In this subsection (1)(b), adverse effect must be determined based
16 on a consideration of an applicant's plan for the exercise of the permit that demonstrates that the applicant's use
17 of the water will be controlled so the water right of a prior appropriator will be satisfied;

18 (c) the proposed means of diversion, construction, and operation of the appropriation works are adequate;

19 (d) the proposed use of water is a beneficial use;

20 (e) the applicant has a possessory interest, or the written consent of the person with the possessory
21 interest, in the property where the water is to be put to beneficial use;

22 (f) the water quality of a prior appropriator will not be adversely affected;

23 (g) fish or fish habitat, as defined in 87-5-501, will not be adversely affected;

24 ~~(g)(h)~~ the proposed use will be substantially in accordance with the classification of water set for the source
25 of supply pursuant to 75-5-301(1); and

26 ~~(h)(i)~~ the ability of a discharge permit holder to satisfy effluent limitations of a permit issued in accordance
27 with Title 75, chapter 5, part 4, will not be adversely affected.

28 (2) The applicant is required to prove that the criteria in subsections (1)(f) through ~~(4)(h)(1)(i)~~ have been met
29 only if a valid objection is filed. A valid objection must contain substantial credible information establishing to the
30 satisfaction of the department that the criteria in subsection (1)(f), ~~(4)(g)(1)(h)~~, or ~~(4)(h)(1)(i)~~, as applicable, may not

1 be met. For the criteria set forth in subsection ~~(4)(g)~~(1)(h), only the department of environmental quality or a local
2 water quality district established under Title 7, chapter 13, part 45, may file a valid objection.

3 (3) The department may not issue a permit for an appropriation of 4,000 or more acre-feet of water a year
4 and 5.5 or more cubic feet per second of water unless the applicant proves by clear and convincing evidence that:

5 (a) the criteria in subsection (1) are met;

6 (b) the proposed appropriation is a reasonable use. A finding must be based on a consideration of the
7 following:

8 (i) the existing demands on the state water supply, as well as projected demands, such as reservations
9 of water for future beneficial purposes, including municipal water supplies, irrigation systems, and minimum
10 streamflows for the protection of existing water rights and aquatic life;

11 (ii) the benefits to the applicant and the state;

12 (iii) the effects on the quantity and quality of water for existing beneficial uses in the source of supply;

13 (iv) the availability and feasibility of using low-quality water for the purpose for which application has been
14 made;

15 (v) the effects on private property rights by any creation of or contribution to saline seep; and

16 (vi) the probable significant adverse environmental impacts of the proposed use of water as determined by
17 the department pursuant to Title 75, chapter 1, or Title 75, chapter 20.

18 (4) (a) The state of Montana has long recognized the importance of conserving its public waters and the
19 necessity to maintain adequate water supplies for the state's water requirements, including requirements for federal
20 non-Indian and Indian reserved water rights held by the United States for federal reserved lands and in trust for the
21 various Indian tribes within the state's boundaries. Although the state of Montana also recognizes that, under
22 appropriate conditions, the out-of-state transportation and use of its public waters are not in conflict with the public
23 welfare of its citizens or the conservation of its waters, the criteria in this subsection (4) must be met before
24 out-of-state use may occur.

25 (b) The department may not issue a permit for the appropriation of water for withdrawal and transportation
26 for use outside the state unless the applicant proves by clear and convincing evidence that:

27 (i) depending on the volume of water diverted or consumed, the applicable criteria and procedures of
28 subsection (1) or (3) are met;

29 (ii) the proposed out-of-state use of water is not contrary to water conservation in Montana; and

30 (iii) the proposed out-of-state use of water is not otherwise detrimental to the public welfare of the citizens

1 of Montana.

2 (c) In determining whether the applicant has proved by clear and convincing evidence that the requirements
3 of subsections (4)(b)(ii) and (4)(b)(iii) are met, the department shall consider the following factors:

4 (i) whether there are present or projected water shortages within the state of Montana;

5 (ii) whether the water that is the subject of the application could feasibly be transported to alleviate water
6 shortages within the state of Montana;

7 (iii) the supply and sources of water available to the applicant in the state where the applicant intends to
8 use the water; and

9 (iv) the demands placed on the applicant's supply in the state where the applicant intends to use the water.

10 (d) When applying for a permit or a lease to withdraw and transport water for use outside the state, the
11 applicant shall submit to and comply with the laws of the state of Montana governing the appropriation, lease, and
12 use of water.

13 (5) To meet the preponderance of evidence standard in this section, the applicant, in addition to other
14 evidence demonstrating that the criteria of subsection (1) have been met, shall submit hydrologic or other evidence,
15 including but not limited to water supply data, field reports, and other information developed by the applicant, the
16 department, the U.S. geological survey, or the U.S. natural resources conservation service and other specific field
17 studies.

18 (6) An appropriation, diversion, impoundment, use, restraint, or attempted appropriation, diversion,
19 impoundment, use, or restraint contrary to the provisions of this section is invalid. An officer, agent, agency, or
20 employee of the state may not knowingly permit, aid, or assist in any manner an unauthorized appropriation,
21 diversion, impoundment, use, or other restraint. A person or corporation may not, directly or indirectly, personally
22 or through an agent, officer, or employee, attempt to appropriate, divert, impound, use, or otherwise restrain or
23 control waters within the boundaries of this state except in accordance with this section.

24 (7) The department may adopt rules to implement the provisions of this section."
25

26 **Section 9.** Section 85-2-402, MCA, is amended to read:

27 **"85-2-402. (Temporary) Changes in appropriation rights.** (1) The right to make a change subject to
28 the provisions of this section in an existing water right, a permit, or a state water reservation is recognized and
29 confirmed. In a change proceeding under this section, there is no presumption that an applicant for a change in
30 appropriation right cannot establish lack of adverse effect prior to the adjudication of other rights in the source of

1 supply pursuant to this chapter. Except as provided in 85-2-410 and subsection (15) of this section, an appropriator
2 may not make a change in an appropriation right without the approval of the department or, if applicable, of the
3 legislature. An applicant shall submit a correct and complete application.

4 (2) Except as provided in subsections (4) through (6) and (15), the department shall approve a change in
5 appropriation right if the appropriator proves by a preponderance of evidence that the following criteria are met:

6 (a) The proposed change in appropriation right will not adversely affect the use of the existing water rights
7 of other persons or other perfected or planned uses or developments for which a permit or certificate has been
8 issued or for which a state water reservation has been issued under part 3.

9 (b) Except for a lease authorization pursuant to 85-2-436, a temporary change authorization for instream
10 use to benefit the fishery resource pursuant to 85-2-408, or water use pursuant to 85-2-439 when authorization does
11 not require appropriation works, the proposed means of diversion, construction, and operation of the appropriation
12 works are adequate.

13 (c) The proposed use of water is a beneficial use.

14 (d) Except for a lease authorization pursuant to 85-2-436 or a temporary change authorization pursuant
15 to 85-2-408 or 85-2-439 for instream flow to benefit the fishery resource, the applicant has a possessory interest,
16 or the written consent of the person with the possessory interest, in the property where the water is to be put to
17 beneficial use.

18 (e) If the change in appropriation right involves salvaged water, the proposed water-saving methods will
19 salvage at least the amount of water asserted by the applicant.

20 (f) The water quality of an appropriator will not be adversely affected.

21 (g) The ability of a discharge permit holder to satisfy effluent limitations of a permit issued in accordance
22 with Title 75, chapter 5, part 4, will not be adversely affected.

23 (h) Fish or fish habitat, as defined in 87-5-501, will not be adversely affected.

24 (3) The applicant is required to prove that the criteria in subsections (2)(f) and (2)(g) have been met only
25 if a valid objection is filed. A valid objection must contain substantial credible information establishing to the
26 satisfaction of the department that the criteria in subsection (2)(f) or (2)(g), as applicable, may not be met.

27 (4) The department may not approve a change in purpose of use or place of use of an appropriation of 4,000
28 or more acre-feet of water a year and 5.5 or more cubic feet per second of water unless the appropriator proves by
29 a preponderance of evidence that:

30 (a) the criteria in subsection (2) are met; and

1 (b) the proposed change is a reasonable use. A finding of reasonable use must be based on a
2 consideration of:

3 (i) the existing demands on the state water supply, as well as projected demands for water for future
4 beneficial purposes, including municipal water supplies, irrigation systems, and minimum streamflows for the
5 protection of existing water rights and aquatic life;

6 (ii) the benefits to the applicant and the state;

7 (iii) the effects on the quantity and quality of water for existing uses in the source of supply;

8 (iv) the availability and feasibility of using low-quality water for the purpose for which application has been
9 made;

10 (v) the effects on private property rights by any creation of or contribution to saline seep; and

11 (vi) the probable significant adverse environmental impacts of the proposed use of water as determined by
12 the department pursuant to Title 75, chapter 1, or Title 75, chapter 20.

13 (5) The department may not approve a change in purpose of use or place of use for a diversion that results
14 in 4,000 or more acre-feet of water a year and 5.5 or more cubic feet per second of water being consumed unless:

15 (a) the applicant proves by clear and convincing evidence and the department finds that the criteria in
16 subsections (2) and (4) are met; and

17 (b) for the withdrawal and transportation of appropriated water for out-of-state use, the department then
18 petitions the legislature and the legislature affirms the decision of the department after one or more public hearings.

19 (6) The state of Montana has long recognized the importance of conserving its public waters and the
20 necessity to maintain adequate water supplies for the state's water requirements, including requirements for federal
21 non-Indian and Indian reserved water rights held by the United States for federal reserved lands and in trust for the
22 various Indian tribes within the state's boundaries. Although the state of Montana also recognizes that, under
23 appropriate conditions, the out-of-state transportation and use of its public waters are not in conflict with the public
24 welfare of its citizens or the conservation of its waters, the following criteria must be met before out-of-state use may
25 occur:

26 (a) The department and, if applicable, the legislature may not approve a change in appropriation right for
27 the withdrawal and transportation of appropriated water for use outside the state unless the appropriator proves by
28 clear and convincing evidence and, if applicable, the legislature approves after one or more public hearings that:

29 (i) depending on the volume of water diverted or consumed, the applicable criteria and procedures of
30 subsection (2) or (4) are met;

- 1 (ii) the proposed out-of-state use of water is not contrary to water conservation in Montana; and
- 2 (iii) the proposed out-of-state use of water is not otherwise detrimental to the public welfare of the citizens
3 of Montana.
- 4 (b) In determining whether the appropriator has proved by clear and convincing evidence that the
5 requirements of subsections (6)(a)(ii) and (6)(a)(iii) will be met, the department and, if applicable, the legislature shall
6 consider the following factors:
- 7 (i) whether there are present or projected water shortages within the state of Montana;
- 8 (ii) whether the water that is the subject of the proposed change in appropriation might feasibly be
9 transported to alleviate water shortages within the state of Montana;
- 10 (iii) the supply and sources of water available to the applicant in the state where the applicant intends to
11 use the water; and
- 12 (iv) the demands placed on the applicant's supply in the state where the applicant intends to use the water.
- 13 (c) When applying for a change in appropriation right to withdraw and transport water for use outside the
14 state, the applicant shall submit to and comply with the laws of the state of Montana governing the appropriation
15 and use of water.
- 16 (7) For any application for a change in appropriation right involving 4,000 or more acre-feet of water a year
17 and 5.5 or more cubic feet per second of water, the department shall give notice of the proposed change in
18 accordance with 85-2-307 and shall hold one or more hearings in accordance with 85-2-309 prior to its approval or
19 denial of the proposed change. The department shall provide notice and may hold one or more hearings upon any
20 other proposed change if it determines that the proposed change might adversely affect the rights of other persons.
- 21 (8) The department or the legislature, if applicable, may approve a change subject to the terms, conditions,
22 restrictions, and limitations that it considers necessary to satisfy the criteria of this section, including limitations
23 on the time for completion of the change. The department may extend time limits specified in the change approval
24 under the applicable criteria and procedures of 85-2-312(3).
- 25 (9) Upon actual application of water to the proposed beneficial use within the time allowed, the appropriator
26 shall notify the department that the appropriation has been completed. The notification must contain a certified
27 statement by a person with experience in the design, construction, or operation of appropriation works describing
28 how the appropriation was completed.
- 29 (10) If a change is not completed as approved by the department or legislature or if the terms, conditions,
30 restrictions, and limitations of the change approval are not complied with, the department may, after notice and

1 opportunity for hearing, require the appropriator to show cause why the change approval should not be modified or
2 revoked. If the appropriator fails to show sufficient cause, the department may modify or revoke the change approval.

3 (11) The original of a change approval issued by the department must be sent to the applicant, and a
4 duplicate must be kept in the office of the department in Helena.

5 (12) A person holding an issued permit or change approval that has not been perfected may change the
6 place of diversion, place of use, purpose of use, or place of storage by filing an application for change pursuant to
7 this section.

8 (13) A change in appropriation right contrary to the provisions of this section is invalid. An officer, agent,
9 agency, or employee of the state may not knowingly permit, aid, or assist in any manner an unauthorized change
10 in appropriation right. A person or corporation may not, directly or indirectly, personally or through an agent, officer,
11 or employee, attempt to change an appropriation right except in accordance with this section.

12 (14) The department may adopt rules to implement the provisions of this section.

13 (15) (a) An appropriator may change an appropriation right for a replacement well without the prior approval
14 of the department if:

15 (i) the appropriation right is for:

16 (A) ground water outside the boundaries of a controlled ground water area; or

17 (B) ground water inside the boundaries of a controlled ground water area and if the provisions of the order
18 declaring the controlled ground water area do not restrict such a change;

19 (ii) the change in appropriation right is to replace an existing well and the existing well will no longer be
20 used;

21 (iii) the rate and volume of the appropriation from the replacement well are equal to or less than that of the
22 well being replaced and do not exceed 35 gallons a minute and 10 acre-feet a year;

23 (iv) the water from the replacement well is appropriated from the same aquifer as the water appropriated from
24 the well being replaced; and

25 (v) a timely, correct and complete notice of replacement well is submitted to the department as provided
26 in subsection (15)(b).

27 (b) (i) After completion of a replacement well and appropriation of ground water for a beneficial use, the
28 appropriator shall file a notice of replacement well with the department on a form provided by the department.

29 (ii) The department shall review the notice of replacement well and shall issue an authorization of a change
30 in an appropriation right if all of the criteria in subsection (15)(a) have been met and the notice is correct and

1 complete.

2 (iii) The department may not issue an authorization of a change in appropriation right until a correct and
3 complete notice of replacement well has been filed with the department. The department shall return a defective
4 notice to the appropriator, along with a description of defects in the notice. The appropriator shall refile a corrected
5 and completed notice of replacement well within 30 days of notification of defects or within a further time as the
6 department may allow, not to exceed 6 months.

7 (iv) If a notice of replacement well is not completed within the time allowed, the appropriator shall:

8 (A) cease appropriation of water from the replacement well pending approval by the department; and

9 (B) submit an application for a change in appropriation right to the department pursuant to subsections (1)
10 through (3).

11 (c) The provisions of this subsection (15) do not apply to an appropriation right abandoned under 85-2-404.

12 (d) For each well that is replaced under this subsection (15), the appropriator shall follow the well
13 abandonment procedures, standards, and rules adopted by the board of water well contractors pursuant to
14 37-43-202.

15 (e) The provisions of subsections (2), (3), (9), and (10) do not apply to a change in appropriation right that
16 meets the requirements of subsection (15)(a). (Terminates June 30, 2005--sec. 6, Ch. 322, L. 1995; sec. 14, Ch.
17 487, L. 1995.)

18 **85-2-402. (Effective July 1, 2005) Changes in appropriation rights.** (1) The right to make a change
19 subject to the provisions of this section in an existing water right, a permit, or a state water reservation is recognized
20 and confirmed. In a change proceeding under this section, there is no presumption that an applicant for a change
21 in appropriation right cannot establish lack of adverse effect prior to the adjudication of other rights in the source
22 of supply pursuant to this chapter. Except as provided in 85-2-410 and subsection (15) of this section, an
23 appropriator may not make a change in an appropriation right without the approval of the department or, if applicable,
24 of the legislature. An applicant shall submit a correct and complete application.

25 (2) Except as provided in subsections (4) through (6) and (15), the department shall approve a change in
26 appropriation right if the appropriator proves by a preponderance of evidence that the following criteria are met:

27 (a) The proposed change in appropriation right will not adversely affect the use of the existing water rights
28 of other persons or other perfected or planned uses or developments for which a permit or certificate has been
29 issued or for which a state water reservation has been issued under part 3.

30 (b) Except for a lease authorization pursuant to 85-2-436 that does not require appropriation works, the

1 proposed means of diversion, construction, and operation of the appropriation works are adequate.

2 (c) The proposed use of water is a beneficial use.

3 (d) The applicant has a possessory interest, or the written consent of the person with the possessory
4 interest, in the property where the water is to be put to beneficial use.

5 (e) If the change in appropriation right involves salvaged water, the proposed water-saving methods will
6 salvage at least the amount of water asserted by the applicant.

7 (f) The water quality of an appropriator will not be adversely affected.

8 (g) The ability of a discharge permit holder to satisfy effluent limitations of a permit issued in accordance
9 with Title 75, chapter 5, part 4, will not be adversely affected.

10 (h) Fish or fish habitat, as defined in 87-5-501, will not be adversely affected.

11 (3) The applicant is required to prove that the criteria in subsections (2)(f) and (2)(g) have been met only
12 if a valid objection is filed. A valid objection must contain substantial credible information establishing to the
13 satisfaction of the department that the criteria in subsection (2)(f) or (2)(g), as applicable, may not be met.

14 (4) The department may not approve a change in purpose of use or place of use of an appropriation of 4,000
15 or more acre-feet of water a year and 5.5 or more cubic feet per second of water unless the appropriator proves by
16 a preponderance of evidence that:

17 (a) the criteria in subsection (2) are met; and

18 (b) the proposed change is a reasonable use. A finding of reasonable use must be based on a
19 consideration of:

20 (i) the existing demands on the state water supply, as well as projected demands for water for future
21 beneficial purposes, including municipal water supplies, irrigation systems, and minimum streamflows for the
22 protection of existing water rights and aquatic life;

23 (ii) the benefits to the applicant and the state;

24 (iii) the effects on the quantity and quality of water for existing uses in the source of supply;

25 (iv) the availability and feasibility of using low-quality water for the purpose for which application has been
26 made;

27 (v) the effects on private property rights by any creation of or contribution to saline seep; and

28 (vi) the probable significant adverse environmental impacts of the proposed use of water as determined by
29 the department pursuant to Title 75, chapter 1, or Title 75, chapter 20.

30 (5) The department may not approve a change in purpose of use or place of use for a diversion that results

1 in 4,000 or more acre-feet of water a year and 5.5 or more cubic feet per second of water being consumed unless:

2 (a) the applicant proves by clear and convincing evidence and the department finds that the criteria in
3 subsections (2) and (4) are met; and

4 (b) for the withdrawal and transportation of appropriated water for out-of-state use, the department then
5 petitions the legislature and the legislature affirms the decision of the department after one or more public hearings.

6 (6) The state of Montana has long recognized the importance of conserving its public waters and the
7 necessity to maintain adequate water supplies for the state's water requirements, including requirements for federal
8 non-Indian and Indian reserved water rights held by the United States for federal reserved lands and in trust for the
9 various Indian tribes within the state's boundaries. Although the state of Montana also recognizes that, under
10 appropriate conditions, the out-of-state transportation and use of its public waters are not in conflict with the public
11 welfare of its citizens or the conservation of its waters, the following criteria must be met before out-of-state use may
12 occur:

13 (a) The department and, if applicable, the legislature may not approve a change in appropriation right for
14 the withdrawal and transportation of appropriated water for use outside the state unless the appropriator proves by
15 clear and convincing evidence and, if applicable, the legislature approves after one or more public hearings that:

16 (i) depending on the volume of water diverted or consumed, the applicable criteria and procedures of
17 subsection (2) or (4) are met;

18 (ii) the proposed out-of-state use of water is not contrary to water conservation in Montana; and

19 (iii) the proposed out-of-state use of water is not otherwise detrimental to the public welfare of the citizens
20 of Montana.

21 (b) In determining whether the appropriator has proved by clear and convincing evidence that the
22 requirements of subsections (6)(a)(ii) and (6)(a)(iii) will be met, the department and, if applicable, the legislature shall
23 consider the following factors:

24 (i) whether there are present or projected water shortages within the state of Montana;

25 (ii) whether the water that is the subject of the proposed change in appropriation might feasibly be
26 transported to alleviate water shortages within the state of Montana;

27 (iii) the supply and sources of water available to the applicant in the state where the applicant intends to
28 use the water; and

29 (iv) the demands placed on the applicant's supply in the state where the applicant intends to use the water.

30 (c) When applying for a change in appropriation right to withdraw and transport water for use outside the

1 state, the applicant shall submit to and comply with the laws of the state of Montana governing the appropriation
2 and use of water.

3 (7) For any application for a change in appropriation right involving 4,000 or more acre-feet of water a year
4 and 5.5 or more cubic feet per second of water, the department shall give notice of the proposed change in
5 accordance with 85-2-307 and shall hold one or more hearings in accordance with 85-2-309 prior to its approval or
6 denial of the proposed change. The department shall provide notice and may hold one or more hearings upon any
7 other proposed change if it determines that the proposed change might adversely affect the rights of other persons.

8 (8) The department or the legislature, if applicable, may approve a change subject to the terms, conditions,
9 restrictions, and limitations that it considers necessary to satisfy the criteria of this section, including limitations
10 on the time for completion of the change. The department may extend time limits specified in the change approval
11 under the applicable criteria and procedures of 85-2-312(3).

12 (9) Upon actual application of water to the proposed beneficial use within the time allowed, the appropriator
13 shall notify the department that the appropriation has been completed. The notification must contain a certified
14 statement by a person with experience in the design, construction, or operation of appropriation works describing
15 how the appropriation was completed.

16 (10) If a change is not completed as approved by the department or legislature or if the terms, conditions,
17 restrictions, and limitations of the change approval are not complied with, the department may, after notice and
18 opportunity for hearing, require the appropriator to show cause why the change approval should not be modified or
19 revoked. If the appropriator fails to show sufficient cause, the department may modify or revoke the change approval.

20 (11) The original of a change approval issued by the department must be sent to the applicant, and a
21 duplicate must be kept in the office of the department in Helena.

22 (12) A person holding an issued permit or change approval that has not been perfected may change the
23 place of diversion, place of use, purpose of use, or place of storage by filing an application for change pursuant to
24 this section.

25 (13) A change in appropriation right contrary to the provisions of this section is invalid. An officer, agent,
26 agency, or employee of the state may not knowingly permit, aid, or assist in any manner an unauthorized change
27 in appropriation right. A person or corporation may not, directly or indirectly, personally or through an agent, officer,
28 or employee, attempt to change an appropriation right except in accordance with this section.

29 (14) The department may adopt rules to implement the provisions of this section.

30 (15) (a) An appropriator may change an appropriation right for a replacement well without the prior approval

1 of the department if:

2 (i) the appropriation right is for:

3 (A) ground water outside the boundaries of a controlled ground water area; or

4 (B) ground water inside the boundaries of a controlled ground water area and if the provisions of the order
5 declaring the controlled ground water area do not restrict such a change;

6 (ii) the change in appropriation right is to replace an existing well and the existing well will no longer be
7 used;

8 (iii) the rate and volume of the appropriation from the replacement well are equal to or less than that of the
9 well being replaced and do not exceed 35 gallons a minute and 10 acre-feet a year;

10 (iv) the water from the replacement well is appropriated from the same aquifer as the water appropriated from
11 the well being replaced; and

12 (v) a timely, correct and complete notice of replacement well is submitted to the department as provided
13 in subsection (15)(b).

14 (b) (i) After completion of a replacement well and appropriation of ground water for a beneficial use, the
15 appropriator shall file a notice of replacement well with the department on a form provided by the department.

16 (ii) The department shall review the notice of replacement well and shall issue an authorization of a change
17 in an appropriation right if all of the criteria in subsection (15)(a) have been met and the notice is correct and
18 complete.

19 (iii) The department may not issue an authorization of a change in appropriation right until a correct and
20 complete notice of replacement well has been filed with the department. The department shall return a defective
21 notice to the appropriator, along with a description of defects in the notice. The appropriator shall refile a corrected
22 and completed notice of replacement well within 30 days of notification of defects or within a further time as the
23 department may allow, not to exceed 6 months.

24 (iv) If a notice of replacement well is not completed within the time allowed, the appropriator shall:

25 (A) cease appropriation of water from the replacement well pending approval by the department; and

26 (B) submit an application for a change in appropriation right to the department pursuant to subsections (1)
27 through (3).

28 (c) The provisions of this subsection (15) do not apply to an appropriation right abandoned under 85-2-404.

29 (d) For each well that is replaced under this subsection (15), the appropriator shall follow the well
30 abandonment procedures, standards, and rules adopted by the board of water well contractors pursuant to

1 37-43-202.

2 (e) The provisions of subsections (2), (3), (9), and (10) do not apply to a change in appropriation right that
3 meets the requirements of subsection (15)(a). (Terminates June 30, 2009--sec. 9, Ch. 123, L. 1999.)

4 **85-2-402. (Effective July 1, 2009) Changes in appropriation rights.** (1) The right to make a change
5 subject to the provisions of this section in an existing water right, a permit, or a state water reservation is recognized
6 and confirmed. In a change proceeding under this section, there is no presumption that an applicant for a change
7 in appropriation right cannot establish lack of adverse effect prior to the adjudication of other rights in the source
8 of supply pursuant to this chapter. Except as provided in 85-2-410 and subsection (15) of this section, an
9 appropriator may not make a change in an appropriation right without the approval of the department or, if applicable,
10 of the legislature. An applicant shall submit a correct and complete application.

11 (2) Except as provided in subsections (4) through (6) and (15), the department shall approve a change in
12 appropriation right if the appropriator proves by a preponderance of evidence that the following criteria are met:

13 (a) The proposed change in appropriation right will not adversely affect the use of the existing water rights
14 of other persons or other perfected or planned uses or developments for which a permit or certificate has been
15 issued or for which a state water reservation has been issued under part 3.

16 (b) The proposed means of diversion, construction, and operation of the appropriation works are adequate.

17 (c) The proposed use of water is a beneficial use.

18 (d) The applicant has a possessory interest, or the written consent of the person with the possessory
19 interest, in the property where the water is to be put to beneficial use.

20 (e) If the change in appropriation right involves salvaged water, the proposed water-saving methods will
21 salvage at least the amount of water asserted by the applicant.

22 (f) The water quality of an appropriator will not be adversely affected.

23 (g) The ability of a discharge permit holder to satisfy effluent limitations of a permit issued in accordance
24 with Title 75, chapter 5, part 4, will not be adversely affected.

25 (h) Fish or fish habitat, as defined in 87-5-501, will not be adversely affected.

26 (3) The applicant is required to prove that the criteria in subsections (2)(f) and (2)(g) have been met only
27 if a valid objection is filed. A valid objection must contain substantial credible information establishing to the
28 satisfaction of the department that the criteria in subsection (2)(f) or (2)(g), as applicable, may not be met.

29 (4) The department may not approve a change in purpose of use or place of use of an appropriation of 4,000
30 or more acre-feet of water a year and 5.5 or more cubic feet per second of water unless the appropriator proves by

1 a preponderance of evidence that:

2 (a) the criteria in subsection (2) are met; and

3 (b) the proposed change is a reasonable use. A finding of reasonable use must be based on a
4 consideration of:

5 (i) the existing demands on the state water supply, as well as projected demands for water for future
6 beneficial purposes, including municipal water supplies, irrigation systems, and minimum streamflows for the
7 protection of existing water rights and aquatic life;

8 (ii) the benefits to the applicant and the state;

9 (iii) the effects on the quantity and quality of water for existing uses in the source of supply;

10 (iv) the availability and feasibility of using low-quality water for the purpose for which application has been
11 made;

12 (v) the effects on private property rights by any creation of or contribution to saline seep; and

13 (vi) the probable significant adverse environmental impacts of the proposed use of water as determined by
14 the department pursuant to Title 75, chapter 1, or Title 75, chapter 20.

15 (5) The department may not approve a change in purpose of use or place of use for a diversion that results
16 in 4,000 or more acre-feet of water a year and 5.5 or more cubic feet per second of water being consumed unless:

17 (a) the applicant proves by clear and convincing evidence and the department finds that the criteria in
18 subsections (2) and (4) are met; and

19 (b) for the withdrawal and transportation of appropriated water for out-of-state use, the department then
20 petitions the legislature and the legislature affirms the decision of the department after one or more public hearings.

21 (6) The state of Montana has long recognized the importance of conserving its public waters and the
22 necessity to maintain adequate water supplies for the state's water requirements, including requirements for
23 reserved water rights held by the United States for federal reserved lands and in trust for the various Indian tribes
24 within the state's boundaries. Although the state of Montana also recognizes that, under appropriate conditions,
25 the out-of-state transportation and use of its public waters are not in conflict with the public welfare of its citizens
26 or the conservation of its waters, the following criteria must be met before out-of-state use may occur:

27 (a) The department and, if applicable, the legislature may not approve a change in appropriation right for
28 the withdrawal and transportation of appropriated water for use outside the state unless the appropriator proves by
29 clear and convincing evidence and, if applicable, the legislature approves after one or more public hearings that:

30 (i) depending on the volume of water diverted or consumed, the applicable criteria and procedures of

1 subsection (2) or (4) are met;

2 (ii) the proposed out-of-state use of water is not contrary to water conservation in Montana; and

3 (iii) the proposed out-of-state use of water is not otherwise detrimental to the public welfare of the citizens
4 of Montana.

5 (b) In determining whether the appropriator has proved by clear and convincing evidence that the
6 requirements of subsections (6)(a)(ii) and (6)(a)(iii) will be met, the department and, if applicable, the legislature shall
7 consider the following factors:

8 (i) whether there are present or projected water shortages within the state of Montana;

9 (ii) whether the water that is the subject of the proposed change in appropriation might feasibly be
10 transported to alleviate water shortages within the state of Montana;

11 (iii) the supply and sources of water available to the applicant in the state where the applicant intends to
12 use the water; and

13 (iv) the demands placed on the applicant's supply in the state where the applicant intends to use the water.

14 (c) When applying for a change in appropriation right to withdraw and transport water for use outside the
15 state, the applicant shall submit to and comply with the laws of the state of Montana governing the appropriation
16 and use of water.

17 (7) For any application for a change in appropriation right involving 4,000 or more acre-feet of water a year
18 and 5.5 or more cubic feet per second of water, the department shall give notice of the proposed change in
19 accordance with 85-2-307 and shall hold one or more hearings in accordance with 85-2-309 prior to its approval or
20 denial of the proposed change. The department shall provide notice and may hold one or more hearings upon any
21 other proposed change if it determines that the proposed change might adversely affect the rights of other persons.

22 (8) The department or the legislature, if applicable, may approve a change subject to the terms, conditions,
23 restrictions, and limitations that it considers necessary to satisfy the criteria of this section, including limitations
24 on the time for completion of the change. The department may extend time limits specified in the change approval
25 under the applicable criteria and procedures of 85-2-312(3).

26 (9) Upon actual application of water to the proposed beneficial use within the time allowed, the appropriator
27 shall notify the department that the appropriation has been completed. The notification must contain a certified
28 statement by a person with experience in the design, construction, or operation of appropriation works describing
29 how the appropriation was completed.

30 (10) If a change is not completed as approved by the department or legislature or if the terms, conditions,

1 restrictions, and limitations of the change approval are not complied with, the department may, after notice and
2 opportunity for hearing, require the appropriator to show cause why the change approval should not be modified or
3 revoked. If the appropriator fails to show sufficient cause, the department may modify or revoke the change approval.

4 (11) The original of a change approval issued by the department must be sent to the applicant, and a
5 duplicate must be kept in the office of the department in Helena.

6 (12) A person holding an issued permit or change approval that has not been perfected may change the
7 place of diversion, place of use, purpose of use, or place of storage by filing an application for change pursuant to
8 this section.

9 (13) A change in appropriation right contrary to the provisions of this section is invalid. An officer, agent,
10 agency, or employee of the state may not knowingly permit, aid, or assist in any manner an unauthorized change
11 in appropriation right. A person or corporation may not, directly or indirectly, personally or through an agent, officer,
12 or employee, attempt to change an appropriation right except in accordance with this section.

13 (14) The department may adopt rules to implement the provisions of this section.

14 (15) (a) An appropriator may change an appropriation right for a replacement well without the prior approval
15 of the department if:

16 (i) the appropriation right is for:

17 (A) ground water outside the boundaries of a controlled ground water area; or

18 (B) ground water inside the boundaries of a controlled ground water area and if the provisions of the order
19 declaring the controlled ground water area do not restrict such a change;

20 (ii) the change in appropriation right is to replace an existing well and the existing well will no longer be
21 used;

22 (iii) the rate and volume of the appropriation from the replacement well are equal to or less than that of the
23 well being replaced and do not exceed 35 gallons a minute and 10 acre-feet a year;

24 (iv) the water from the replacement well is appropriated from the same aquifer as the water appropriated from
25 the well being replaced; and

26 (v) a timely, correct and complete notice of replacement well is submitted to the department as provided
27 in subsection (15)(b).

28 (b) (i) After completion of a replacement well and appropriation of ground water for a beneficial use, the
29 appropriator shall file a notice of replacement well with the department on a form provided by the department.

30 (ii) The department shall review the notice of replacement well and shall issue an authorization of a change

1 in an appropriation right if all of the criteria in subsection (15)(a) have been met and the notice is correct and
2 complete.

3 (iii) The department may not issue an authorization of a change in appropriation right until a correct and
4 complete notice of replacement well has been filed with the department. The department shall return a defective
5 notice to the appropriator, along with a description of defects in the notice. The appropriator shall refile a corrected
6 and completed notice of replacement well within 30 days of notification of defects or within a further time as the
7 department may allow, not to exceed 6 months.

8 (iv) If a notice of replacement well is not completed within the time allowed, the appropriator shall:

9 (A) cease appropriation of water from the replacement well pending approval by the department; and

10 (B) submit an application for a change in appropriation right to the department pursuant to subsections (1)
11 through (3).

12 (c) The provisions of this subsection (15) do not apply to an appropriation right abandoned under 85-2-404.

13 (d) For each well that is replaced under this subsection (15), the appropriator shall follow the well
14 abandonment procedures, standards, and rules adopted by the board of water well contractors pursuant to
15 37-43-202.

16 (e) The provisions of subsections (2), (3), (9), and (10) do not apply to a change in appropriation right that
17 meets the requirements of subsection (15)(a)."

18

19 **Section 10.** Section 85-2-407, MCA, is amended to read:

20 **"85-2-407. (Temporary) Temporary changes in appropriation right.** (1) Except as provided in 85-2-410,
21 an appropriator may not make a temporary change in appropriation right for the appropriator's use or another's use
22 except with department approval in accordance with 85-2-402 and this section.

23 (2) Except as provided in subsection (9), a temporary change in appropriation right may be approved for
24 a period not to exceed 10 years. A temporary change in appropriation right may be approved for consecutive or
25 intermittent use.

26 (3) An authorization for a temporary change in appropriation right may be renewed by the department for
27 a period not to exceed 10 years. Renewal of an authorization for a temporary change in appropriation right requires
28 application to the department by the appropriator. Upon application, the department shall notify other appropriators
29 potentially affected by the renewal and shall allow 30 days for submission of new evidence of adverse effects to
30 other water rights. A temporary change authorization may not be renewed by the department if it determines that;

1 (a) the right of an appropriator, other than an appropriator described in subsection (7), is adversely affected;

2 or

3 (b) fish or fish habitat, as defined in 87-5-501, will be adversely affected.

4 (4) (a) During the term of the original temporary change authorization, the department may modify or revoke
5 its authorization for a temporary change if it determines that the right of an appropriator, other than an appropriator
6 described in subsection (7), is adversely affected.

7 (b) An appropriator, other than an appropriator identified in subsection (7), may object:

8 (i) during the initial temporary change application process;

9 (ii) during the temporary change renewal process; and

10 (iii) once during the term of the temporary change permit.

11 (5) The priority of appropriation for a temporary change in appropriation right is the same as the priority of
12 appropriation of the right that is temporarily changed.

13 (6) Neither a change in appropriation right nor any other authorization right is required for reversion of the
14 appropriation right to the permanent purpose, place of use, point of diversion, or place of storage after the period
15 for which a temporary change was authorized expires.

16 (7) A person issued a water use permit with a priority of appropriation after the date of filing of an
17 application for a temporary change in appropriation right under this section may not object to the exercise of the
18 temporary change according to its terms, the renewal of the authorization for the temporary change, or the reversion
19 of the appropriation right to its permanent purpose, place of use, point of diversion, or place of storage. Persons
20 described in this subsection must be notified of the existence of any temporary change authorizations from the
21 same source of supply.

22 (8) If a water right for which a temporary change has been approved is transferred as an appurtenance of
23 real property, the temporary change remains in effect unless another change in appropriation right is authorized by
24 the department.

25 (9) If the quantity of water that is subject to a temporary change is made available from the development
26 of a new water conservation or storage project, a temporary change in appropriation right pursuant to 85-2-408 may
27 be approved for a period equal to the expected life of the project, not to exceed 30 years. (Terminates June 30,
28 2005--sec. 3, Ch. 433, L. 2001.)

29 **85-2-407. (Effective July 1, 2005) Temporary changes in appropriation right.** (1) Except as provided
30 in 85-2-410, an appropriator may not make a temporary change in appropriation right for the appropriator's use or

1 another's use except with department approval in accordance with 85-2-402 and this section.

2 (2) A temporary change in appropriation right may be approved for a period not to exceed 10 years. A
3 temporary change in appropriation right may be approved for consecutive or intermittent use.

4 (3) An authorization for a temporary change in appropriation right may be renewed by the department for
5 a period not to exceed 10 years. Renewal of an authorization for a temporary change in appropriation right requires
6 application to the department by the appropriator. Upon application, the department shall notify other appropriators
7 potentially affected by the renewal and shall allow 30 days for submission of new evidence of adverse effects to
8 other water rights. A temporary change authorization may not be renewed by the department if it determines that:

9 (a) the right of an appropriator, other than an appropriator described in subsection (7), is adversely affected;

10 or

11 (b) fish or fish habitat, as defined in 87-5-501, will be adversely affected.

12 (4) (a) During the term of the original temporary change authorization, the department may modify or revoke
13 its authorization for a temporary change if it determines that the right of an appropriator, other than an appropriator
14 described in subsection (7), is adversely affected.

15 (b) An appropriator, other than an appropriator identified in subsection (7), may object:

16 (i) during the initial temporary change application process;

17 (ii) during the temporary change renewal process; and

18 (iii) once during the term of the temporary change permit.

19 (5) The priority of appropriation for a temporary change in appropriation right is the same as the priority of
20 appropriation of the right that is temporarily changed.

21 (6) Neither a change in appropriation right nor any other authorization right is required for reversion of the
22 appropriation right to the permanent purpose, place of use, point of diversion, or place of storage after the period
23 for which a temporary change was authorized expires.

24 (7) A person issued a water use permit with a priority of appropriation after the date of filing of an
25 application for a temporary change in appropriation right under this section may not object to the exercise of the
26 temporary change according to its terms, the renewal of the authorization for the temporary change, or the reversion
27 of the appropriation right to its permanent purpose, place of use, point of diversion, or place of storage. Persons
28 described in this subsection must be notified of the existence of any temporary change authorizations from the
29 same source of supply.

30 (8) If a water right for which a temporary change has been approved is transferred as an appurtenance of

1 real property, the temporary change remains in effect unless another change in appropriation right is authorized by
2 the department."

3

4 **Section 11.** Section 85-2-412, MCA, is amended to read:

5 **"85-2-412. Return of surplus water to stream.** ~~(1) In all cases where, by virtue of prior appropriation, any~~
6 ~~person may have~~ A prior appropriator shall return surplus water to the stream if:

7 (a) the appropriator has diverted all the water of any stream or to such an extent that there ~~shall not be an~~
8 ~~amount is not a~~ sufficient amount left therein in the stream for:

9 (i) those having a subsequent right to the waters of ~~such the stream; or~~

10 (ii) the protection of fish or fish habitat, as defined in 87-5-501; and

11 (b) there shall is, at any time, ~~be~~ a surplus of the water ~~so~~ diverted, ~~over and above in excess of~~ what is
12 actually and necessarily used by the prior appropriator, ~~such,~~

13 (2) The person shall be required to ~~appropriator shall~~ turn and cause the surplus water to flow back into
14 the stream ~~such surplus water~~. Upon failure to ~~do so~~ turn the flow back into the stream within 24 hours after a
15 written demand being has been made upon ~~him~~ the appropriator in writing, to him in person or at his the
16 appropriator's place of abode, by any person having a right to the use of ~~such the~~ surplus water or by the department
17 of fish, wildlife, and parks, the person ~~so~~ diverting the ~~same water shall be is~~ liable to the person aggrieved for the
18 damage resulting ~~therefrom from the diversion of water,~~ in ~~such sum as~~ an amount that may be determined by
19 court."
20

21 **Section 12.** Section 87-5-501, MCA, is amended to read:

22 **"87-5-501. State policy.** ~~(1) It is hereby declared to be~~ the policy of the state of Montana that its fish and
23 wildlife resources and particularly the fishing waters and fish habitat within the state are to be protected and
24 preserved ~~to the end so~~ that they will be available for all time, without change, in their natural existing state except
25 as may be necessary and appropriate after due consideration of all factors involved.

26 (2) As used in this part, "fish habitat" means the areas in and adjacent to a water body on which fish
27 depend directly or indirectly in order to carry out their life processes, including spawning, nursery, rearing, food
28 supply, and migration areas."

29

30 **Section 13.** Section 87-5-504, MCA, is amended to read:

1 **"87-5-504. Notice of department findings and alternative plans.** Within 30 days after the receipt of
 2 ~~such the~~ plans submitted under 87-5-502, the department shall notify the applicant whether or not ~~such the~~
 3 construction project or hydraulic project will adversely affect ~~any fish, fish habitat,~~ or game habitat. If the department
 4 notifies the applicant that ~~such construction the project~~ will adversely affect ~~any fish, fish habitat,~~ or game habitat,
 5 it shall accompany ~~such the~~ notice with recommendations or alternative plans ~~which that~~ will eliminate or diminish
 6 ~~such the~~ adverse effect."

7

8 **Section 14.** Section 87-5-505, MCA, is amended to read:

9 **"87-5-505. Arbitration of disputes.** (1) If the department notifies the applicant that the construction will
 10 adversely affect fish, fish habitat, or game habitat, the applicant, within 15 days after receiving the recommendations
 11 and alternatives of the department, shall notify the department if ~~it the applicant~~ refuses to modify its plans in
 12 accordance with the recommendations or alternatives. In the event of refusal, the disagreement ~~shall must~~ be
 13 arbitrated as provided in subsection (2) ~~of this section~~.

14 (2) (a) Upon receipt of a notice of refusal, the department shall determine if it wants the disagreement
 15 arbitrated. Within 10 days after an affirmative determination and after notice to the applicant, the department shall
 16 notify, in writing, all district judges of the judicial district or districts in which the project is located that an arbitration
 17 board is needed. Within 5 days of receipt of notification, the judges shall appoint three people from the county or
 18 counties in which the project is located to an arbitration committee. Within 10 days after the committee is
 19 appointed, it shall meet, hear testimony from all the parties concerned, and issue a decision signed by at least two
 20 members of the committee. The decision ~~shall be~~ is binding on all parties concerned.

21 (b) Travel expenses of the arbitrators ~~shall must~~ be allowed as provided in 2-18-501 through 2-18-503, ~~as~~
 22 ~~amended~~, and ~~shall must~~ be divided equally among the agencies involved."

23

24 **Section 15.** Section 87-5-508, MCA, is amended to read:

25 **"87-5-508. Federal actions injuring fish and wildlife.** The department shall observe acts and omissions
 26 on the part of the government of the United States and its agencies within the state of Montana ~~which do, will, or~~
 27 ~~might that may~~ affect adversely ~~the fish, fish habitat, and or~~ wildlife resources, including but not limited to the fishing
 28 streams within the state, ~~and upon~~ Upon receiving ~~such that~~ information, the department shall without delay send
 29 formal notification in writing, by certified mail, to the appropriate federal agency or agencies involved, setting forth
 30 in detail the appropriate objections of the state of Montana to the acts and omissions ~~aforsaid~~. The department

1 shall keep complete files and records, available for public inspection, of all matters and things done and all
2 communications and correspondence sent and received pursuant to this section."

3 - END -